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No. _____

In The

Supreme Court of the United States

October Term, 1987

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

-vs-

JAMES E. BROWER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

– AND APPENDIX –

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QUESTION PRESENTED

WHETHER JEOPARDY ATTACHES IN A BENCH TRIAL WHEN THE COURT BEGINS TO HEAR EVIDENCE?

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-vs-

JAMES E. BROWER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court is in the form of an order denying leave to appeal filed March 28, 1988, and reported at 430 Mich 863 (1988). The decision of the Michigan Court of Appeals is dated November 2, 1987, and is reported at 164 Mich App 245; 416 NW2d 397 (1987). Copies of the order of the Michigan Supreme Court and the opinion of the Michigan Court of Appeals are included in the Appendix to this Petition along with copies of the decisions of the Oakland County Circuit Court and the 52/1 District Court.

JURISDICTION

The order of the Michigan Supreme Court was filed on March 28, 1988. The jurisdiction of this Court is invoked under 28 USC 1257(3). The decision of the

Michigan Court of Appeals is based on the United States Supreme Court cases, *Serfass* v *United States*, 420 US 377; 95 S Ct 1055; 43 L Ed 2d 265 (1975) and *Crist* v *Bretz*, 437 US 28; 98 S Ct 2156; 57 L Ed 2d 24 (1978), and the decision of the Fourth Circuit in *Goolsby* v *Hutto*, 691 F2d 199 (CA 4, 1982).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which this petition involves are:

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> (emphasis supplied)

Constitution of the United States, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privi-

leges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Respondent was arrested October 6, 1982, and charged with operating a motor vehicle while under the influence of intoxicating liquor. Respondent retained an attorney who requested a jury trial and adjournment of the scheduled pre-trial. The assistant prosecutor agreed to the adjournment.

Defense counsel subsequently requested (and was granted) four more adjournments. On February 28, 1983, the date scheduled for a defense motion to dismiss, Respondent's attorney appeared, withdrew the motion to dismiss and his jury trial demand, and asked the court to schedule a bench trial. The case was set for a bench trial on March 17, 1983.

On the trial date, the assistant prosecutor informed the court that his only two witnesses, who were police officers, were detained in another court. He requested an adjournment, or, in the alternative, a short continuance to give the police witnesses an opportunity to appear. The judge denied these requests. (Appendix E, pp E-1 – E-6)

The assistant prosecutor then asked the court to dismiss the charge. Respondent's counsel objected unless the court was going to make the dismissal with prejudice. He also stated that the defense was prepared to proceed. (App. E, p E-2) The court responded by telling defense counsel to call his first witness. Respondent

was sworn and asked by defense counsel to state his name. He refused to answer "on the grounds that it would tend to incriminate me." That was the only question he was asked. (App. E, p E-5)

The following colloquy then occurred:

> MR. BRADY [Ass't Prosecutor]: I would just like the Record to reflect the continuing objection of the People. I think the whole thing has become a farce at this point.
>
> MR. LARIN [Defense counsel]: We have no further witnesses to present.
>
> THE COURT: Wait a minute. At this point the witness has been sworn and voluntarily taken the stand. Then he's waived his right of protection, has he not?
>
> MR. LARIN: No. At no time, Your Honor, does he waive until he actually enters and starts to answer questions. I ask now that the case be dismissed with prejudice, Your Honor.
>
> THE COURT: The Court has no choice at this point but to dismiss the matter. This matter is dismissed.
>
> MR. LARIN: Dismissed with prejudice, Your Honor?
>
> THE COURT: As to with prejudice, or not, the Court's not going to decide that issue at this point. That's not before the Court.
>
> (App. E, p E-6)

Petitioner reissued the case. Respondent moved to dismiss the new case claiming that a prosecution would violate his right not to be twice placed in jeopardy. The district court judge to whom the case was

assigned reviewed the prior proceedings and issued a written opinion in which he determined that Respondent had not been placed in jeopardy. (Appendix D) Respondent was tried and convicted. He then appealed to the Oakland County Circuit Court.

On January 31, 1986, Judge Robert L. Templin ruled that jeopardy attached at the first proceeding and that the second trial therefore violated the ban on double jeopardy. (Appendix C) An order to this effect was entered February 27, 1986.

Petitioner appealed this ruling by application to the Michigan Court of Appeals. By order dated September 12, 1986, that Court granted the application. On November 2, 1987, the Court of Appeals issued a unanimous published opinion affirming the Oakland County Circuit Court. *People* v *Brower*, 164 Mich App 245; 416 NW2d 397 (1987). (Appendix B) The basis for the Court's ruling was its interpretation of the United States Supreme Court decisions in *Serfass* v *United States*, 420 US 377; 95 S Ct 1055; 43 L Ed 2d 265 (1975) and *Crist* v *Bretz*, 437 US 28; 98 S Ct 2156; 57 L Ed 2d 24 (1978), and the decision of the Fourth Circuit in *Goolsby* v *Hutto*, 691 F2d 199 (CA 4, 1982).

Petitioner pursued an application for leave to appeal in the Michigan Supreme Court. On March 28, 1988, that Court entered an order denying leave to appeal. 430 Mich 863 (1988). (Appendix A)

REASONS FOR GRANTING THE WRIT

This Court has ruled that the Fifth Amendment double jeopardy prohibition applies to the States through the Fourteenth Amendment. *Benton* v *Maryland*, 395 US 784, 794; 89 S Ct 2056; 23 L Ed 2d 707

(1969). The Michigan Supreme Court has recognized that the federal standard of when jeopardy attaches is controlling. *People* v *Thompson*, 424 Mich 118; 379 NW2d 49 (1985). The Michigan Supreme Court in *Thompson, supra*, also interpreted the state constitutional double jeopardy provision identically to its federal counterpart.

In *Downum* v *United States*, 372 US 734; 83 S Ct 1033; 10 L Ed 2d 100 (1963), this Court held that in a jury trial, jeopardy attached at the time a jury is sworn. The precise point at which jeopardy attaches in a non-jury trial has not been decided; in fact, this question has produced conflicting statements from this Court.

The primary case cited for deciding the point at which jeopardy attaches in a bench trial is *Serfass* v *United States*, 420 US 377; 95 S Ct 1055; 43 L Ed 2d 265 (1975). That case considered the appealability of a pretrial order dismissing an indictment. The defendant had demanded a jury, but of course no jury had been chosen because the case was dismissed. This Court noted that courts had "found it useful to define a point in criminal proceedings" at which jeopardy attaches. Citing *Downum, supra*, this Court noted that jeopardy attaches in a jury trial when the jury is sworn. 420 US at 388. This Court then stated:

> * * * In a non-jury trial, jeopardy attaches when the court begins to hear evidence. *McCarthy* v *Zerbst*, 85 F2d 640, 642 (CA 10, 1936). See *Wade* v *Hunter*, 336 US 684, 688 (1949). * * * .

Subsequently, in *Lee* v *United States*, 432 US 23; 97 S Ct 2141; 53 L Ed 2d 80 (1977), in the context of a bench trial, this Court cited *Serfass, supra*, and noted:

> As this was a bench trial, jeopardy did not attach until the court began to hear evidence. * * * .
>
> 432 US at 27, n 3; citation omitted.

The following year, this Court decided the case of *Crist* v *Bretz*, 437 US 28; 98 S Ct 2156; 57 L Ed 2d 24 (1978). *Crist* was a jury trial case. This Court decided that the federal rule of when jeopardy attaches in a jury trial is controlling on the States as "an integral part of the constitutional guarantee against double jeopardy." 437 US at 38. In passing, the Court again cited *Serfass, supra*, and noted:

> In nonjury trials jeopardy does not attach until the first witness is sworn. * * * .
>
> 437 US at 37, n 15; citation omitted.

Thus, although the issue was not before this Court in *Crist*, the footnote set forth above apparently signalled to some courts a change in the point at which jeopardy attached in a bench trial.

For example, in Michigan the Michigan Supreme Court quoted directly from *Serfass, supra*, in *People* v *Alvin Johnson*, 396 Mich 424, 431 n 3; 240 NW2d 729 (1976), *cert den* 429 US 951; 97 S Ct 370; 50 L Ed 2d 319 (1976). That direct quotation used the language: "In a nonjury trial, jeopardy attaches when the court begins to hear evidence." However, in *People* v *Cooke*, 419 Mich 420, 434 n 3; 355 NW2d 88 (1984), the Michigan Supreme Court again cited *Serfass*, but paraphrased its holding as: "In a bench trial, jeopardy attaches at the time the prosecution calls its first witness."

Neither case presented the issue of when jeopardy attaches in a bench trial, so these statements are dicta. Nevertheless, the confusion exhibited by the Michigan

Supreme Court is reflected in the decisions of other courts.

The Tenth Circuit, in a case cited by this Court in *Serfass, supra,* stated that jeopardy did not attach in a non-jury trial until "the court has begun to hear evidence." *McCarthy* v *Zerbst,* 85 F2d 640, 642 (CA 10, 1936).

In *Newman* v *United States,* 410 F2d 259 (CA DC, 1969), a panel of the Court which included then-Judge Burger, held that jeopardy attached in a bench trial when "the court has begun to hear evidence." That case involved a witness who was sworn but gave no testimony. The Court held that jeopardy did not attach.

In *Blondes* v *State,* 273 Md 435; 330 A2d 169, 174 (1975), the Maryland Court of Appeals held that jeopardy attaches in a non-jury trial "when the judge begins to hear or receive evidence."

More recently, in *Goolsby* v *Hutto,* 691 F2d 199 (CA 4, 1982), a case relied on by the Michigan Court of Appeals in the instant case, the Fourth Circuit noted the seemingly inconsistent positions taken by this Court in *Serfass, Lee,* and *Crist.* It then determined that the underlying concerns of the double jeopardy prohibition would best be effectuated by holding that jeopardy attached when "the first witness is sworn" whether or not that witness testifies. *Id.* at 202.

In *Justices of Boston Municipal Court* v *Lydon,* 466 US 294, 309; 104 S Ct 1805; 80 L Ed 2d 311 (1984), this Court, once again in dicta, stated:

> We assume, without deciding, that jeopardy attached at the swearing of the first witness at Lydon's bench trial. * * * .

Exhibiting some of the understandable confusion which has arisen because of the conflicting language, the Illinois Supreme Court, in *People* v *Deems*, 81 Ill2d 384; 410 NE2d 8 (1980), stated:

> * * * The traditional rule is that jeopardy attaches in a bench trial when the first witness is sworn and the court begins to hear evidence. * * * .

More recently, the Illinois Supreme Court revisited this question in *People* v *Rudi*, 103 Ill2d 216; 469 NE2d 580 (1984). This time the Court noted the "traditional rule that jeopardy attaches when the first witness is sworn." Nevertheless, the Court followed its earlier decision in *Deems*, *supra*, by deciding that jeopardy had not attached (even though a witness had been sworn) since no evidence of any kind had been introduced. Although urged by the defendant to follow *Goolsby*, *supra*, the Court declined:

> * * * To the extent that the two cases [*Deems* and *Goolsby*] are in conflict, we believe our own precedent is the accurate statement of the law for the reasons we have given.
>
> 469 NE2d at 548.

See also: *State* v *Rhodes*, 76 N Mex 177; 413 P2d 214, 216 (1966); *State* v *Ferris*, 80 N Mex 663; 459 P2d 462, 466 (1969), each holding that jeopardy only attaches in a non-jury trial when there is "presentation of at least some evidence on behalf of the state."

The Michigan Court of Appeals relied entirely on *Goolsby* in arriving at its determination in the instant case. This reliance was based on the factual similarity between the two cases and because of the seemingly conflicting positions taken by the United States Supreme

Court. This case presents this Court with an opportunity to resolve the conflict that has arisen over the point at which jeopardy attaches in a bench trial. In so doing, Petitioner requests that this Court recognize, as it did long ago in *Wade* v *Hunter*, 336 US 684, 688-689; 69 S Ct 834; 93 L Ed 974 (1949):

> * * * The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there was no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

Petitioner submits that the instant case presents one of those "instances" in which the defendant's right to the completion of his "trial" by a particular tribunal must be subordinated. The prosecution was not given "one full and fair opportunity to present his evidence to an impartial [trier of fact]." *Arizona* v *Washington*, 434 US 497, 505; 98 S Ct 824; 54 L Ed 2d 717 (1978). This problem is a continuing one which has caused a split of authority to develop both in the state and federal courts. Since the point at which jeopardy attaches is a matter upon which the United States Supreme Court is the final arbiter, Petitioner respectfully requests this Honorable Court to grant this petition for a writ of certiorari and decide, once and for all, when jeopardy attaches in a non-jury trial.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari to review the judgments of the Michigan Supreme Court and Michigan Court of Appeals, or, in the alternative, to grant summary reversal of those decisions.

Respectfully submitted,

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DATED: May 25, 1988

APPENDICES TO PETITION FOR CERTIORARI

• • •

APPENDIX A

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Certified March 28, 1988)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JAMES E. BROWER, Defendant-Appellee — SC: 82100; COA: 91353; CC: 84-DA-2982-AR; DC: 82-7-1936-1)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

(*Certification Omitted*)

APPENDIX B

OPINION

(State of Michigan — Court of Appeals)

(Released November 2, 1987)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JAMES E. BROWER, Defendant-Appellee — NO. 91353)

Before: M. J. Kelly, P.J.; Beasley and P. Edwards*, JJ.

M. J. Kelly, P.J.

Defendant was arrested on October 6, 1982, and subsequently charged with operating a motor vehicle while under the influence of intoxicating liquor, MCL 257.625; MSA 9.2325. After several delays prompted by defendant, the case was scheduled for a bench trial on March 17, 1983. On that date the prosecutor informed the court that two police witnesses had been detained in another court. The prosecutor asked for an adjournment, or in the alternative a short continuance to give the officers an opportunity to appear. The court denied the request. The prosecutor then asked the court to dismiss the charges. Defense counsel objected unless the dismissal was with prejudice. The trial court then denied the prosecutor's request and ordered defense counsel to call his first witness, presumably to attach jeopardy. Defendant was called to the stand and upon being asked his name refused to testify, asserting the Fifth Amendment.

After the district court judge "dismissed the case without deciding whether, in its opinion, jeopardy had

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* Recorder's court judge, sitting on the Court of Appeals by assignment.

attached", the prosecutor refiled the charges against defendant. Defendant filed a motion to dismiss on the basis of double jeopardy, which the court denied. Defendant was then convicted and appealed his conviction to circuit court, which reversed on double jeopardy grounds. The prosecutor now appeals by leave. We affirm.

> The Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence [*sic*] to be twice put in jeopardy of life or limb . . . ." The federal Double Jeopardy Clause protects the finality of judgments, *Crist* v *Bretz*, 437 US 28, 33; 98 S Ct 2156; 57 L Ed 2d 24 (1978), and the individual's interest in not being repeatedly subjected to prosecution for the same offense. *Green* v *United States*, 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957); *Arizona* v *Washington*, 434 US 497, 503-504; 98 S Ct 824; 54 L Ed 2d 717 (1978). Once jeopardy has attached, the protections of the Double Jeopardy Clause are triggered. Jeopardy attaches in a criminal jury trial once the jury is empaneled and sworn. *Crist, supra*. The federal standard of when jeopardy attaches is applicable to the states. *Crist, supra*. [*People* v *Thompson*, 424 Mich 118, 122; 379 NW2d 4 (1985), reh den 424 Mich 1206 (1986).]

The question here is, at what point does jeopardy attach in a bench trial? Appellant relies on *Serfass* v *United States*, 420 US 377, 388; 95 S Ct 1055; 43 L Ed 2d 265 (1975), where the Supreme Court stated: "In a nonjury trial, jeopardy attaches when the court begins to hear evidence." This language has been cited with approval with slight variation[1] in footnotes to two

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[1] While *People* v *Johnson* directly quotes *Serfass*, the footnote in *People* v *Cooke* states:

[*concluded on page B-3*]

Michigan Supreme Court cases: *People* v *Alvin Johnson*, 396 Mich 424, 431 n3; 240 NW2d 729 (1976); *People* v *Cooke*, 419 Mich 420, 434 n3; 355 NW2d 88 (1984). However, neither *Serfass*, *Johnson*, or *Cooke* are factually on point with this case. *Serfass* involved a pretrial order of dismissal, *Johnson* involved a guilty plea, and *Cooke* was a consolidated case in which the referred-to footnote was part of the opinion that dealt with a prosecutor's appeal after acquittal in a bench trial. *Cooke* was affirmed on statutory grounds and the double jeopardy question was not reached.

The final statement made by the Court in *Serfass* was:

> We hold only that the Double Jeopardy Clause does not bar an appeal by the United States under 18 USC § 3731 with respect to a criminal defendant who has not been "put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States* v *Jorn*, 400 US [470] at 479 [91 S Ct 547; 27 L Ed 2d 543 (1971)]. [*Serfass*, *supra* at 394.]

In the subsequent United States Supreme Court case of *Crist* v *Bretz*, *supra*, double jeopardy was again the issue. Montana law provided that in a jury trial jeopardy did not attach until the first witness was sworn. The Supreme Court disagreed and held that once the jury was sworn jeopardy attached. In its discussion, the Court cited *Serfass* and stated in a footnote:

> In nonjury trials jeopardy does not attach until the first witness is sworn. *Serfass* v *United States*, 420 US 377, 388 [95 S Ct 1055; 43 L Ed 2d 265]. [*Crist*, *supra* at 37, n 15.]

(*continued from page B-2*)

> In a bench trial, jeopardy attaches at the time the prosecution calls its first witness. *Serfass* v *United States*, 420 US 377; 95 S Ct 1055; 43 L Ed 2d 265 (1975).

Subsequently, this footnote was adopted by the Fourth Circuit Court of Appeals as the point at which jeopardy attaches in a bench trial. In *Goolsby* v *Hutto*, 691 F2d 199 (CA 4, 1982), two different district court judges denied the prosecutor's motion for nolo prosequi and the prosecutor refused to go forward with evidence. The trial judge called and swore in a detective who had been subpoenaed as a defense witness. The prosecutor refused to ask any questions of the witness, who was then dismissed. The trial judge concluded that jeopardy had attached and dismissed the charges for lack of evidence. The Fourth Circuit Court of Appeals concluded that jeopardy had attached when the witness was sworn and that further prosecution on a felony charge involving the same circumstances was barred.

The rationale in *Goolsby* was that defendant was put to trial before the trier of fact and when the witness was called and sworn the defendant became subjected to either conviction or acquittal. "The fact that the witness gave no evidence required the acquittal of Goolsby by the general district court, just as his conviction would have been required had the witness given evidence sufficient to sustain his guilt." *Goolsby, supra* at 202. *Goolsby* held that when the witness was sworn the court began to hear evidence, and it was immaterial whether or not the witness testified.

The facts in *Goolsby* are on point with the facts presented in this case. Defendant here was put in jeopardy once the first witness was sworn, regardless of the fact that the witness subsequently did not answer questions but asserted his Fifth Amendment privilege against self-incrimination.

We hold that the circuit court did not err and that jeopardy attaches in a bench trial once the first witness is sworn.

Affirmed.

APPENDIX C

DECISION

(State of Michigan – Circuit Court – County of Oakland)

(Issued January 31, 1986)

(THE PEOPLE OF THE STATE OF MICHIGAN, -vs- JAMES E. BROWER, Defendant — 84 DA 2982 AR)

PROCEEDINGS HAD in the above-entitled cause before the HONORABLE ROBERT L. TEMPLIN, Circuit Judge (P21323), on January 31, 1986, at the Oakland County Courthouse, Pontiac, Michigan.

APPEARANCES: RICHARD H. BROWNE, Appearing for the People; RONALD PENTZ, Appearing for the Defendant.

* * *

(2) THE CLERK: Your Honor, calling case #84-DA-2982 AR, People of the State of Michigan versus James Brower.

MR. PENTZ: For the record, your Honor, Ronald Pentz on behalf of the appellant. Your Honor, I have submitted my brief to the Court. I waive any further argument. We'll rely and depend on the written briefs.

MR. BROWNE: Your Honor, Richard Browne appearing on behalf of the Prosecutor's Office. I, too, have submitted my brief and from discussions with your Honor in chambers I will waive my further argument. I think the issues are adequately briefed.

THE COURT: Yes. Let the record show the Court has discussed this case at length with Counsel in chambers and the Court is ready to render an opinion. It appears to the Court to be a case of first impression, at least to this Court. The Defendant herein, James E. Brower, was

charged with the crime of OUIL, Operating Under the Influence, and trial was set in the lower district court; at that time the People did not have any witnesses and the Court ordered them to proceed. The Defendant was placed on the stand and then, after he was sworn, took the 5th Amendment and did not testify. The case was then dismissed and later set for trial at which the People's witnesses did appear and Defendant was found guilty. The Defendant (3) appeals to this Court stating, among other things, that it is a case of double jeopardy, being tried twice for the same crime.

There's no question in the Court's mind that if a jury trial had taken place, double jeopardy would attach when the jury was sworn in. One of the most recent Federal cases on the subject is Serfass versus the United States decided March 3, 1975, at 420 U.S. 377; this case, however, was a bench trial and the defendant was sworn but did not testify. There was no other testimony. This Court finds that when the Defendant was sworn and took the witness stand, double jeopardy attached. The fact that the Defendant availed himself of his Constitutional Right to remain silent should not result in the forfeiture of his Constitutional Right against double jeopardy. To hold that the People must present a witness for jeopardy to attach would allow the People to refuse to present evidence making a sham of the court's order to proceed with the trial. If the Defendant must produce evidence of his innocence for jeopardy to attach it would violate the Defendant's right to be presumed innocent until proven guilty. Therefore, this Court holds the Defendant's conviction must be reversed as it violated the Defendant's Constitutional Right against double jeopardy.

(4) MR. PENTZ: Thank you, your Honor.

MR. BROWNE: Thank you, your Honor.

(Certificate of Reporter Omitted)

APPENDIX D

OPINION

(State of Michigan — District Court —
County of Oakland — 52nd District, 1st Division)

(Issued September 2, 1983)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, -vs-
JAMES E. BROWER, Defendant — District Court Case
No. 82-7-1936-1)

The Court hearing oral arguments of both Defendant and Prosecuting Attorney on Defendant's Motion to Dismiss on the grounds of double jeopardy and having read the briefs submitted to the Court on August 11, 1983, took the matter under advisement.

FACTS:

The defendant was arrested on October 6, 1982 for operating a motor vehicle under the influence of intoxicating liquor. At arraignment he pled not guilty. The case was set for pre-trial on October 28, 1982. In the interim the defendant retained an attorney who requested a jury trial and an adjournment of the pre-trial. The assistant prosecutor agreed to the adjournment.

The pre-trial was re-set for November 11, 1982. A defense motion to dismiss was also scheduled for a hearing November 15, 1982. The morning the motion was to be heard the defense attorney called the Court and requested that both the motion and the pre-trial be adjourned as he needed more time to prepare. The assistant prosecutor, though prepared, again agreed to an adjournment.

The Court rescheduled the defendant's motion to dismiss on three different dates: December 8, 1982, January 6, 1983 and February 7, 1983. On each date it was adjourned at the defense attorney's request. Eventually the Court was able to schedule the motion on a day convenient for the defense attorney to attend. On February 2, 1983, he appeared, withdrew his motion to dismiss, as well as his demand for a jury trial, and the case was set for a bench trial on March 17, 1983.

On the trial date the assistant prosecutor informed the Court that his two witnesses, who were police officers, had been detained in another court. He asked the Court to grant him an adjournment or, in the alternative, a short continuance to give the officers an opportunity to appear. The Court denied those requests.

The assistant prosecutor then stated he was unable to proceed and moved the Court to dismiss the charges. Defense counsel objected unless the dismissal was with prejudice, otherwise he was prepared to go and wished to call his first witness. The Court did not grant the prosecutor's request to dismiss and ordered defense counsel to call his first witness.

At this point the prosecutor objected to calling the defendant's witness before the People had introduced any evidence. The Court allowed the defense counsel to proceed over the prosecutor's objection. The defendant was called to the stand. The first and only question that counsel asked was, "Witness, would you state your name for the record?" The defendant responded, "I refuse to answer on the grounds that it would tend to incriminate me." (Trial transcript p. 6) The prosecutor did not ask any questions, the witness stood down and the Court dismissed the case without deciding whether, in its opinion, jeopardy had attached.

Subsequently, the prosecutor's office reinstated the case. The defense attorney has moved to prohibit the People from prosecuting the case on the grounds that jeopardy attached at the first trial.

ISSUE:

Did jeopardy attach in the first bench trial.

OPINION:

The double jeopardy clause of the United States Constitution provides that, "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . ." U.S. Const. amend. V. This clause has been held to apply to the States through the Fourteenth Amendment. *Benton* -v- *Maryland*, 395 U.S. 784, 794 (1969).[1] While it is clear that the Constitution forbids the government from putting an individual in jeopardy twice for the same offense, the Constitution does not indicate exactly when, during the course of a trial, jeopardy attaches. The United States Supreme Court, however, has held that jeopardy attaches in a jury trial when the panel is sworn and in a bench trial when the judge, sitting as the trier of fact, begins to hear evidence. *Serfass* -v- *United States*, 420 U.S. 377, 388 (1975).[2]

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[1] The Michigan Constitution provides that, "No person shall be subject to the same offense to be twice put in jeopardy," MI CONST. art. I, § 15.

[2] This rule is also recognized in the following cases: *McCarthy* -v- *Zerbst*, 85 F.2d 640, 642 (1936) (10th Cir.), *cert. denied*, 299 U.S. 610 (1936); *Wade* -v- *Hunter*, 169 F.2d 973 (1948) (10th Cir.), *aff'd on the* [*sic*, other] *grounds*, 336 U.S. 684 (1949); *Green* -v- *United States*, 335 U.S. 184 (1957); *Newman* -v- *United States*, 410 F.2d 259 (1969), *cert. denied*, 396 U.S. 868 (1969); *Clawans* -v- *Rives*, 104 F.2d 240 (1948); *United States* -v- *Franchee*, 323 F. Supp. 1069 (1970 D.D.C.)

In contrast, the various State courts, while agreeing that jeopardy attaches in a jury trial when the panel is sworn, have disagreed on the point at which it attaches in a bench trial. Some, without being more specific have held that jeopardy attaches when the trial commences. Others have held that jeopardy attaches when the case is called by the court, or when the first witness is sworn.[3] However, this Court has not been presented with any cases purporting to determine when jeopardy attaches to a bench trial under the Michigan Constitution. The Model Penal Code suggests that jeopardy attaches in all cases upon the swearing of the first witness. MODEL PENAL CODE § 1.08(4) (Proposed Official Draft 1962). Without considering the relative merits of the decisions made by courts in other States or the suggestion made by the drafters of the Model Penal Code, this Court is obligated to follow the Supreme Court's interpretation of the Fifth Amendment and to ignore standards which conflict with the precedent established in *Serfass*, supra.

Given that jeopardy attaches in a bench trial when the court begins to hear evidence; the instant case turns on whether the defendant's answer to his attorney's question was actually evidence. Evidence, as defined by Blackstone, signifies that which demonstrates, makes clear, or ascertains the truth of the very point in issue, either on one side or the other. *San Antonio Traction Co* -v- *Higdon Texas*, 123 S.W. 732 (1909). Black's Law Dictionary defines evidence as, "Any species of proof, or probative matter presented at the trial of an issue, by the act of the parties and through the medium of witnesses . . . for the purpose of

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[3] For a complete review of the rules in other jurisdictions see: WHEN DOES JEOPARDY ATTACH IN A NONJURY TRIAL Annot., 49 A.L.R. 3d 1039.

inducing belief in the minds of the court or jury as to their contention." *Taylor* -v- *Howard*, 111 R.I. 527, 304 A2d. 891, 893 (1973). Both definitions indicate that testimony is not evidence unless it has some measure of probative value.

The double jeopardy clause is designed to protect individuals from multiple prosecutions for the same offense. It prevents the government from using ". . . its resources and power . . . to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." *United States* -v- *Green*, 335 U.S. 184, 187 (1957). Thus, the double jeopardy clause protects citizens from the prosecutor's potential abuse of the government's power. On the other hand, the reasons and need for the double jeopardy clause should not be allowed to obscure the People's legitimate interest in protecting society and punishing criminals. *Green, Id.*, at 218-219. (Frankfurter, J., dissenting). Naturally, an overemphasis of the State's interests could lead to a deprivation of the accuseds' rights. However, where, as in the instant case, the risk of deprivation is insignificant, the States' interests should be given great weight.[4]

In the case at bar the State's interest in prosecution is significant. The defendant has been charged with operating a motor vehicle while under the influence of intoxicating liquor. If he actually committed the offense the State is interested in seeing that he received appropriate counselling and punishment so that the offense is not repeated. Conversely, allowing the State

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[4] NOTE, Double Jeopardy: The Reprosecution Problem, 77 HARV. L. REV. 1272, 1274 (1964).

to continue its prosecution would not significantly deprive the defendant of those rights secured him by the double jeopardy clause. In the first trial the defendant was never actually in jeopardy. The word jeopardy, as it appears in the Fifth Amendment, designates nothing more than the danger of conviction and punishment. 22 C.J.S. § 238. There is absolutely no possibility of conviction and punishment where the prosecutor fails to present evidence. Furthermore, it is necessary and reasonable to imply from the Supreme Court's holding in *Serfass*, (that jeopardy attaches in a bench trial when the court begins to hear evidence) that the court was contemplating evidence produced by the People.[5] It is common practice in criminal law for the People to present their evidence first as they have the burden of proving defendant's guilt. If they fail to present any evidence at all the defendant has never been put in any danger of conviction since the State is required to prove its case beyond a reasonable doubt and nothing may be inferred from the defendant's refusal to testify. Finally, whatever delay or anxiety might have been suffered by the defendant in the instant case is attributable primarily to the conduct of his own attorney. The defendant's attorney requested and was granted five adjournments before the first trial. Unfortunately, the day on which it was convenient for him to appear in court was inconvenient for the prosecution's witnesses. It is only fair to extend to the People a portion of the consideration granted the defendant. Certainly the right of a citizen to be free from oppressive or unjust reprosecution must be en-

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[5] The New Mexico Supreme Court has held that jeopardy does not attach in a bench trial until the court begins to hear evidence produced by the State. *State* -v- *Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966); *State* -v- *Ferris*, 80 N.M. 663, 459 P.2d 462 (1969). Though this Court does not consider itself bound by those decisions it does find their logic compelling.

forced by the courts at all levels. However, at the same time, as the Supreme Court enjoined in *Wade* -v- *Hunter*, 336 U.S. 684 (1949), ". . . overzealous concern for the rights of the defendant must not be allowed to present an obstacle to the administration of justice in . . . cases where there is no semblance of the oppressive practices at which the double jeopardy prohibition is aimed." *Id.*, at 688-689.

This Court has carefully considered the defendant's brief. The defendant cites *Goolsby* -v- *Hutto*, 691 F.29 [*sic*] 199 (1982) for the proposition that jeopardy attaches in a bench trial when the first witness is sworn. *Id.* The defendant's reliance on the *Goolsby* decision is misplaced for three reasons. First, this Court is not bound by that decision but by the Supreme Court's direction in *Serfass*, supra. Second, and perhaps most importantly, the court in *Goolsby* misquoted the applicable law. The *Goolsby* court cites the case of *Crist* -v- *Britz* [*sic*], 437 U.S. 28 (1978), as authority for the notion that jeopardy attaches in a bench trial when the first witness is sworn. *Id.*, fn 15. The *Crist* court, in turn, cites *Serfass*, supra at 388. However, a careful reading of *Serfass* reveals that the Supreme Court did not say that jeopardy attaches when the first witness is sworn but said that jeopardy attaches when the court, sitting as a trier of fact, begins to hear evidence. *Id.*, at 388.

Finally, the facts presented in *Goolsby* are distinct from the facts presented in the instant case. In *Goolsby*, after the trial court denied the People's motion to nolle prosequi it called a detective to the stand who had investigated the case but who had been subpoenaed by the defendant, swore him in and offered him to the prosecutor for interrogation. When the prosecutor refused to ask any questions the Court told the witness he was free to leave, stated that jeopardy had attached

and dismissed the charges. Thus in *Goolsby* the defendant faced a real possibility of conviction. Once the witness had been subpoenaed, was sworn in, and took the stand the defendant was subjected either to conviction or acquittal, as the witness could possibly have given evidence sufficient to sustain guilt. However, in the instant case conviction was impossible as the prosecution presented no evidence and the only witness to take the stand was the defendant himself called by his own attorney over objection by the People, and who refused to answer the sole question presented to him as to his name on the grounds that it may incriminate him. This Court does not consider defendant's answer as evidence.

CONCLUSION:

For the reasons cited above it is the opinion of this Court that jeopardy did not attach to the first bench trial.

/s/ HAROLD M. BULGARELLI
District Court Judge

DATED: September 2, 1983

APPENDIX E

DECISION

(State of Michigan — District Court —
County of Oakland — 52nd District, 1st Division)

(Issued March 17, 1983)

(PEOPLE OF THE STATE OF MICHIGAN -vs- JAMES EUGENE BROWER, Defendant — District Court No: 82-7-1936-1)

MOTION AND DISMISSAL
BEFORE THE HONORABLE MICHAEL BATCHIK,
District Judge
WALLED LAKE, MICHIGAN — March 17, 1983.

APPEARANCES: Mr. James Brady, Assistant Prosecuting Attorney, Appearing on behalf of the People; Mr. Robert W. Larin, Attorney for the defendant.

* * *

(1) WALLED LAKE, MICHIGAN
Thursday, March 17, 1983, – at about 2:45 p.m.

(The Court, counsel and all parties present)

MR. BRADY: Your Honor, calling next the matter of the People -v- Brower. Today being the date and time for a trial; the defendant being charged with OUIL.

MR. LARIN: Defense is ready, Your Honor.

MR. BRADY: Your Honor, this is the date and time set for trial. I was informed at approximately ten o'clock this morning by Trooper Brown that he and Trooper Schuster were in the Livingston — Livingston District Court, I believe, in Howell. They were in the

process of testifying in two trials in that particular court today and tomorrow.

I called Mr. Larin this morning to seek an adjournment. He indicated that he couldn't, in good conscience, agree to such an adjournment and would be here this afternoon to ask — make a motion to dismiss the charge.

I would indicate to the Court that I've gone through the file. I've reviewed it. This case is an older case. It has been adjourned a number of times. By my count, I believe there has been five adjournments, and I believe that if not all five, at least four of those were because counsel was in other trials or in other courts, (2) and it was not for lack of the People being ready to proceed. I would ask the Court to grant an adjournment in this particular case due to the fact that the officers are unavailable; that they are testifying in another trial.

MR. LARIN: If it please the Court, Robert W. Larin appearing on behalf of Mr. Bower. We had — The previous time Mr. Brady wasn't here. I believe it was the lady prosecutor, Amy Edwards, who was here, and we agreed on this date, because of the fact that this is all due to come into effect at the end of this month, and we agreed to waive jury and everything else to arrive at this point in time, and we're here and prepared to go, and I feel that any —

THE COURT: You just found out about it this morning that the troopers —

MR. BRADY: Yes, Your Honor. I found out I was coming to court here at 9:30, and I found out about ten o'clock that the troopers — They called me from the Livingston County Prosecutor's Office. I returned their phone call. I talked to Trooper Brown. He indicated that under the system that they have out there, I think there were 16 trials scheduled for today and tomorrow,

and they call them in in some shotgun fashion, and this case happened to get called.

MR. LARIN: We certainly would be prejudiced (3) by having this go over, Your Honor. This is the agreement of the parties that today would be the date and how it would be done.

THE COURT: February 28th, impaired, and at that time all the motions had been resolved that were going to be brought before this Court. In fact, you made the request at that time to allow your client to plead to driving while ability impaired, second offense, which was denied without prejudice.

MR. BRADY: Your Honor, I don't know what the Court's schedule is for the next two weeks. I anticipate it is fairly well booked, but that would be a possibility of getting the officers in here, and he could still have his trial before the end of the month.

MR. LARIN: Well, as Your Honor can imagine, since 95% of my practice is drunk driving, I have perhaps ten trials set between now and March 30th. I don't know where that could be fit in, but I don't think there's been a showing — It's not Mr. Brady's fault. There's not been a showing that adequate time was sought here to come in at the — on the day of the trial and ask for this in view of the history. We've backed off on all our pre-trial motions, and waived jury, and everything, just to arrive at this point in time, and we're prejudiced by being required to go ahead with some other date after the end of the month.

(4) THE COURT: May I see both counsel to the bench?

(At about 2:47 p.m. a conference was held at the Bench)

(At about 2:48 p.m. the proceedings reconvened)

THE COURT: Having discussed this matter at the bench with both counsel, I'm satisfied at this point that any of the adjournments previously were adjourned

by the defense counsel on the basis of the hearing on the motion. As I recall, that motion involved the request for ampules, which subsequently on February 28th, defense counsel indicated that that motion would not be apparent and decided to withdraw that motion; is that correct?

MR. LARIN: Yes, Your Honor. Our expert reported to us that they could not sustain the life or retry anymore than 24 hours, so we didn't ask within 24 hours, so we just felt that it was not a proper motion before the Court as a result of our investigation as to what we were planning to present to the Court.

MR. BRADY: Your Honor, I think the Court has to consider the motion eventually was dropped and withdrawn. There were approximately, I believe, three or four months involved in the process of going through on the motion, and before it was eventually withdrawn, there were a number of adjournments, not based on the research or anything else at that point, but because counsel was in (5) trial or was in another court. The — I don't know what would have become of those particular court dates, whether the motion would have been withdrawn earlier or what. I don't think that the People should be made to suffer based on the number of adjournments and the delay in a particular case. The delay has been caused by the defendant. The mere fact that he has withdrawn his motion at this point in time, the bottom line is that the delay in this particular case should be attributed to the defendant.

MR. LARIN: Well, I think that's discretionary with the Court as to whether the defendant was in good faith in moving on this.

THE COURT: First of all, I'm going to deny the motion to adjourn.

MR. LARIN: Well, we're ready for trial. If the prosecutor doesn't have any witnesses, we do, Your Honor. I'd ask that he be sworn.

MR. BRADY: Your Honor, at this point the People do not have any witnesses. That's fairly apparent from what I've told the Court. In any case, there are other matters this afternoon that are ready to proceed, summary type matters. I would ask the Court to pass this matter. Give me an opportunity. Maybe I can get the officers to — one of them over here to leave court so we can get the trial started. I doubt that will happen, but (6) it's worth a shot at this point. If not, I would just ask the Court to dismiss the charges. We are not ready to go. I do not believe that entitles the defendant, since we're not putting any proofs in, to call any witnesses.

MR. LARIN: Well, I don't have any objections if the Court wants to dismiss as long as it's with prejudice. Otherwise, we're prepared to go and start our —

MR. BRADY: I don't believe the Court would be bound to dismiss this matter with prejudice since the matter has not been put in jeopardy — the defendant has not been put in jeopardy yet. Since we cannot proceed, I would ask the Court to just dismiss the charge at this point in time.

THE COURT: Call your first witness, Mr. Larin?

JAMES EUGENE BOWER, Having first been duly sworn by the Court at about 2:51 p.m., testified on his oath as follows:

Direct Examination

BY MR. LARIN:

Q. Witness, would you state your name for the Record?

A. I refuse to answer on the grounds that it would tend to incriminate me.

MR. LARIN: All right. I have nothing further to ask you.

MR. BRADY: No questions, Your Honor.

(7) I would just like the Record to reflect the continuing objection of the People. I think the whole thing has become a farce at this point.

MR. LARIN: We have no further witnesses to present.

THE COURT: Wait a minute. At this point the witness has been sworn and voluntarily taken the stand. Then he's waived his right of protection; has he not?

MR. LARIN: No. At no time, Your Honor, does he waive until he actually enters and starts to answer questions. I ask now that the case be dismissed with prejudice, Your Honor.

THE COURT: The Court has no choice at this point but to dismiss the matter. This matter is dismissed.

MR. LARIN: Dismissed with prejudice, Your Honor?

THE COURT: As to with prejudice or not, the Court's not going to decide that issue at this point. That's not before the Court.

MR. LARIN: Fine, thank you, Your Honor.

(At about 2:53 p.m. the proceedings were concluded)

(*Certificate of Reporter Omitted*)